

LEGAL UPDATE

The effects of the Coronavirus in the workplace

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Introduction

To date, there are over 116 confirmed cases of the virus in South Africa with over 100 people having being placed in quarantine.

According to the WHO, COVID-19 is a highly transmittable disease that spreads when a person coughs, exhales or sneezes and releases droplets of the infected fluid in close proximity of people or on surfaces and other people get into contact with those surfaces.

COVID-19 in the workplace

Due to the close proximity of employees in workplaces, it is imperative that employers consider the risks posed by the virus and the legislative obligations as employers. On any day they run the risk of their employees, business associates and even clients who are infected with the virus bringing it into the workplace.

Occupational health and safety obligations of an employer

Section 8 of the Occupational Health and Safety Act (“**OHSA**”) obliges every employer to take reasonable measures to provide and maintain a safe working environment that does not pose a risk to the health of its employees. This obliges the employer to:

- take steps to eliminate or mitigate any hazard or potential hazard, before resorting to protective equipment;
- provide information, instructions, training and supervision that may be necessary to ensure the health and safety of employees at work;
- enforce such measures as may be necessary in the interests of health and safety.

An employer is further prohibited from permitting a person to enter a workplace where the health and safety of such person is at risk, in terms of the *General Safety Regulations* published under the OHSA.

The *Environmental Regulations* to the OHSA provide that the employer must ensure that its workplace premises are ventilated so as to ensure that the air inhaled by the employees does not pose a risk to their health and safety.

The *Facilities Regulations* to the OHSA oblige employers to provide sanitary facilities, soap or cleansing agent and water as well as cold and hot water. This regulation further obliges employers to ensure that rooms and facilities are clean and hygienic.

The WHO has advised measures aimed at minimising the spread of COVID-19 in the workplace, which include ensuring that the workplace is clean and hygienic and encouraging good hand hygiene, providing hand sanitiser dispensers around the workplace and informing employees on how to minimise the spread of the virus in the workplace circular letters/emails and/or notice boards.

Employers are required in terms of the OHSA to take precautionary measures to protect the workplace and its employees from the spread of communicable diseases such as COVID-19. Given the known transmission vectors of COVID-19, and taking into account the measures recommended by the WHO, South African employers should, and are legally obliged to implement these WHO recommendations and any other practical measures necessary to ensure that employees are not exposed to a working environment, where there is a risk of transmission of COVID-19.

Employers may even refuse entry to the workplace to an employee who has been infected or suspected of being infected with COVID-19 in order to comply with their obligations in terms of OHS. Furthermore, the employer can require a disclosure of an employee's recent international travels and may prohibit employees from travelling abroad on a work-related travel. Importantly, although the employer is not to dictate the travel plans of the employee in his personal capacity, it is entitled to impose certain prophylactic measures, or post-travel self-quarantine.

It is also important to note that this obligation is a shared obligation between the employer and employee. Employees should also consider that it is part of their legal duty of good faith towards their employer, not to do anything that may expose co-workers or the workplace generally to the risk of infection or transmission.

Taking forced leave

On 15 March 2020, the South African government declared a National Disaster and implemented testing and self-quarantine requirements for South African citizens; for those returning from high-risk countries testing and self-isolation or quarantine on return to South Africa is required, and for travellers from medium-risk countries, high intensity screening is required. Travels and visa bans into the country were also implemented. In addition, all non-essential domestic travel, particularly by air, rail, taxis and bus was discouraged.

Should the government impose a further ban on workplaces, employees would not be legally entitled to perform services at work or tender their services. In this case, unless employers are satisfied that employees are able to work remotely (in which case there is no need for the employee to take any leave), the employer can direct that any period of absence due to a government ban can be taken as forced annual leave. If annual leave is exhausted, employees can be requested to agree to take unpaid leave until the ban is lifted. If they refuse to do so, the employer may have an operational requirement to consider retrenchments, and should then follow section 189 of the Labour Relations Act, before it takes or implements any decision in this regard.

Unless and until the government imposes such a ban, workplaces can continue to be staffed, provided that if any employee has travelled to a high or medium risk area and is required to self-isolate, an employer can require such employee to comply with these government directions, and can direct the employee to take forced annual leave to do so, or once this is exhausted, to take unpaid leave. This forced leave period should be for at least 14 days, or a longer period until the employee is able to provide a medical certificate that they are free of COVID-19. In terms of OHS, an employer may refuse to grant access to the workplace to an employee who has been required to self-isolate, in order to ensure that other employees are not exposed to an unsafe work environment.

If an employer wishes to adopt a cautionary approach and shut down its workplace, or a section of the workplace due to a localised outbreak of COVID-19 in the workplace, it may do so and refuse access to affected staff on the basis of the OHS obligation to ensure a safe workplace. In this case, staff can be placed on forced annual leave, or directed to take unpaid leave for the period of absence. Staff should only be allowed to return after 14 days and proof of clearance by a medical practitioner.

Can an employer compel an employee, whom he reasonably suspects of having COVID-19, to medical testing?

Medical testing of employees is dealt with in Section 7 of the Employment Equity Act ("EEA"). This provision prohibits the testing of an employee, unless it is either permitted by legislation or the testing is justifiable in light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or inherent job requirements necessitates such. South African labour courts have consistently held that no exception to the prohibition of medical testing may be made on the basis that the employee consented to the medical testing in the contract of employment.

However, employers are entitled to require employees to be medically tested, if permitted by legislation. In terms of the National Health Act No. 61 of 2003, Regulations Relating to the Surveillance and the Control of Notifiable Medical Conditions were published per *Government Gazette* on 15 December 2017 ("the 2017 Regulations"), and provide that a "carrier or case of a notifiable medical condition listed in Annexure A" must "subject himself or herself to further medical examination".

A "category 1 notifiable medical condition" is defined as a "condition indicated in Annexure A, Table 1, that requires immediate reporting by the most rapid means available upon clinical or laboratory diagnosis followed by a written or electronic notification to the Department of Health within 24 hours of diagnosis by health care providers, private health laboratories or public health laboratories".

COVID-19 may be classified as a category 1 notifiable medical condition under "Respiratory disease caused by a novel respiratory pathogen" in terms of Annexure A, Table 1 of the 2017 Regulations. This is significant because it obliges health care providers and laboratories to notify the Department of Health within 24 hours of a reported diagnosis.

The 2017 Regulations also describe a "medical examination" as including, but not limited to, "a clinical examination followed by the taking of biological specimens necessary for laboratory confirmation". A person who is carrying the virus, is therefore arguably obliged to seek medical

attention in terms of the 2017 Regulations. Regulation 14(3), in turn, places an obligation on those persons “who [have] been in contact with a case or a carrier of a notifiable medical condition” to also subject himself or herself to a medical examination.

As such, since the EEA allows an employer to require medical testing where this is permitted by legislation, and since the 2017 Regulations permit, and in fact, require such medical testing, an employer may require its employees to undergo medical testing for COVID-19 where:

- the employee has recently travelled to an area in which COVID-19 is prevalent; and/or
- the employee has had recent contact with persons travelling from an area in which COVID-19 is prevalent; and/or
- the employee exhibits symptoms consistent with the known symptoms of COVID-19.

If the employee tests positive for the virus, in addition to the employer then requiring the employee to self-quarantine or otherwise refuse entry to the workplace, the health care provider “may prescribe prophylaxis, treatment or implement isolation or quarantine procedures, if deemed necessary”. The 2017 Regulations, therefore, gives health care providers the discretion to quarantine a case or carrier, or a person who has been in contact with such persons, subject to the health care provider’s discretion.

If the employee refuses to give consent to the medical testing, where there are reasonable grounds for the employer to presume that he/she may be a carrier of COVID-19, the employer would be entitled to rely on its obligations in terms of the OHS Act to refuse entry to the workplace.

Can an employer dismiss an employee who has contracted COVID-19 on the basis of medical incapacity?

The Labour Relations Act guarantees an employee the right not to be unfairly dismissed or be subjected to unfair labour practices. According to South African employment law one of the reasons an employer can fairly dismiss an employee is on the basis of incapacity, whether as a result of ill health or injury. The Code of Good Practice on dismissal (“**the code**”) in Schedule 8 paragraph 10 provides the principles dealing with dismissal due to ill health or injury.

If the incapacity renders the employee temporarily unable to work, the employer should investigate the extent of the incapacity. If the employee is likely to be absent from work for a period that is unreasonably long in the circumstances, the employer should investigate all possible alternatives, short of dismissal taking into account the nature of the work, the period of absence, the seriousness of the injury or illness, and the possibility of securing a temporary replacement for the ill or injured employee.

Dismissing an employee merely because they are infected with COVID-19 is likely to amount to an unfair dismissal. Employers are obliged to find means, short of dismissal to accommodate the employee. This may include having the employee work from home. It is important to note that an employee does not, in law, have the right to work from home and this would have to be agreed with the employer. Furthermore, the employer is obliged to ensure that the dismissal is procedurally and substantively fair. Given the relatively short incubation and infectious period of COVID-19, self-quarantine and a reasonable period of isolation from the workplace is a more reasonable response to an employee who contracts the virus.

Sick leave entitlements

Section 22 of the Basic Conditions of Employment Act (“**BCEA**”) regulates sick leave entitlements. During every sick leave cycle, an employee is entitled to an amount of paid sick leave equal to the number of days the employer would normally work during a six week period.

According to section 23 of the BCEA, an employer is not required to pay an employee the sick leave entitlements if the employee has been absent from work for more than two consecutive days or on more than two occasions during an eight week period and the employee does not provide a medical certificate indicating that the employee was unfit to carry out his or her duties during that period.

Therefore, while an employee is in quarantine and being treated for COVID-19, as prescribed by a medical practitioner, the employer is required to pay the employee’s salary for the period of sick leave.

If the employee has not provided a medical certificate and has self-isolated at their own choice, the employer would be legally entitled to refuse to allow the employee to take paid sick leave, and could direct the employee to take either paid annual leave, or unpaid leave for this period.

If the employee is able to perform his/her services remotely, the taking of any form of leave (whether sick leave or annual) may not be necessary.